

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GERALD BRANTLEY,

Plaintiff,

v.

BORG-WARNER MORSE TEC,
INC., et al.,

Defendants.

Case No. 12CV540-GPC(JMA)

**ORDER DENYING PLAINTIFF'S
EX PARTE APPLICATION FOR
AN ORDER GRANTING AN
EXTENSION OF TIME TO
COMPLETE DISCOVERY
PURSUANT TO F.R.C.P. 6(b)
[Doc. No. 162]**

Presently before the Court is a an ex parte application by Plaintiff Lisa Grande for an order granting an extension of time to complete discovery. [Doc. No. 162.] The application is opposed by Defendants The Pep Boys Manny Moe & Jack of California [Doc. No. 168], Ford Motor Company [Doc. No. 170], and The Crane Co. [Doc. No. 171]. As set forth in further detail below, the Court DENIES Plaintiff's ex parte application.

I. Background

This action was initiated by Gerald Brantley, who passed away in February 2013. [Doc. No. 119.] Thereafter, Ms. Grande, his daughter and successor-in-interest, was substituted as the Plaintiff in this action. [Doc. No. 134.] Due to Mr. Brantley's failing health, discovery commenced in this action in mid-2012, prior the issuance of a scheduling order by the Court.

1 Plaintiff's initial disclosures, pursuant to Fed. R. Civ. P. 26(a)(1) were
2 served on July 6, 2012. *Decl. of Luis A. Barba ("Barba Decl.")*, ¶ 12 [Doc.
3 No. 168-1]. Thereafter, Mr. Brantley submitted to a 10 day long deposition
4 from October 22 to November 7, 2012, which took place in the home of Ms.
5 Grande, who was present for nearly the whole time. *Id.* ¶ 5.

6 On January 8, 2013, the parties lodged their Joint Discovery Plan,
7 pursuant to Fed. R. Civ. P. 26(f), proposing, in pertinent part, the deadline
8 for completion of all fact discovery be set for May 31, 2013. The Court
9 conducted a Case Management Conference the following week, on
10 January 15, 2013, to discuss the scheduling and case management issues
11 raised in the parties' Joint Discovery Plan and on the same day, after
12 conferring with counsel, issued a scheduling order requiring all fact
13 discovery be completed by the date proposed by counsel. [Doc. No. 114 &
14 115.] Shortly thereafter, on or about February 8, 2013, Mr. Brantley passed
15 away. [Doc. No. 119.]

16 On April 23, 2013, the Hon. Gonzalo P. Curiel permitted Ms. Grande
17 to substitute in as Plaintiff. [Doc. No. 134.] The following week, Plaintiff filed
18 a motion requesting the Court continue the May 31, 2013 deadline for
19 completion of fact discovery, as well as the deadlines for the exchange of
20 supplemental expert designations and expert disclosures, by approximately
21 three months. [Doc. No. 138.] Plaintiff stated the continuance was needed
22 because Mr. Brantley had recently passed away and activity in the case
23 was essentially stayed due to difficulties in communicating with Ms. Grande
24 and Plaintiff's counsel's efforts to substitute her into the case. *Id.* Plaintiff's
25 motion was granted and the Court reset the deadline for completion of fact
26 discovery on August 30, 2013, the date requested by Plaintiff, and also
27 reset the other discovery deadlines as requested by Plaintiff. [Doc. No.
28 142.]

1 Thereafter, on August 2, 2013, the Court conducted a Case
 2 Management Conference to discuss, among other matters, the status of
 3 discovery. [Doc. No. 158.] Plaintiff's counsel provided no indication that
 4 Plaintiff would be unable to complete fact discovery by the August 30, 2013
 5 deadline.

6 **II. Discussion**

7 Plaintiff now requests an additional seventy days in which to
 8 complete fact discovery and, "[i]n order to prevent any inconvenience to all
 9 parties involved in preparing their expert reports," Plaintiff also requests a
 10 similar continuance of the deadline for Initial Expert Disclosures, Rebuttal
 11 Expert Disclosures and the deadline for completion of expert discovery.
 12 [Doc. No. 162, p. 2.]¹ Plaintiff's ex parte application requests the extension
 13 of time pursuant to Fed. R. Civ. P. Rule 6(b)(1); however, the relief sought,
 14 an extension of the deadlines to complete fact and expert discovery,
 15 implicates the good cause requirement of Fed. R. Civ. P. 16(b)(4), as well
 16 as the meet and confer requirements of Loc. Civ. R. 26.1.a and the
 17 undersigned's Chambers Rules.

18 **A. Plaintiff Has Not Demonstrated Diligence in Conducting** 19 **Discovery or Good Cause to Continue Discovery Deadlines**

20 Fed. R. Civ. P. 16(b)(4) allows a schedule to be modified for good
 21 cause and with a judge's consent. Rule 16(b)'s "good cause" standard
 22 primarily considers the diligence of the party seeking the amendment. See,
 23 e.g., *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604, 609 (9th
 24 Cir.1992); See also *Rich v. Schrader* (S.D. Cal. 2013) 2013 WL 3710806 at
 25 2. Thus, in order to demonstrate good cause, a party must demonstrate its
 26 diligence in taking discovery, its diligence in propounding or noticing the

27
 28 ¹ Although Plaintiff cites the convenience of all parties as the basis for the requested
 continuance, no defendant has joined Plaintiff in making the request and, in fact, three of the
 remaining defendants oppose it.

1 particular outstanding discovery, and explain why the parties could not
2 exchange the particular discovery before the discovery cut off date.
3 Although the existence or degree of prejudice to the party opposing the
4 modification might supply additional reasons to deny a motion, the focus of
5 the inquiry is upon the moving party's reasons for seeking modification.
6 *Johnson*, 975 F.2d at 609 . If that party was not diligent, the inquiry should
7 end. *Id.*

8 Plaintiff explains that Ms. Grande's deposition did not occur until
9 August 12, 2013, and at that time she testified to new information and
10 potential documents and witnesses "that both Plaintiffs (sic) and
11 Defendants have an interest in exploring further." *Id.* p. 7. Furthermore,
12 Plaintiff adds that because counsel was "awaiting the outcome of Ms.
13 Grande's deposition, Plaintiffs (sic) have yet to depose the various persons
14 most knowledgeable for each defendant." *Id.* pp. 6 & 7. Notices of those
15 depositions were served on August 20, 2013. *Decl. of E. Page Allison*
16 (*"Allison Decl."*), Ex. B [Doc. No. 162-1]. Plaintiff's ex parte application was
17 filed the next day, on August 21, 2013, just nine days before the deadline
18 for completion of fact discovery.

19 Plaintiff explains the delay in seeking the deposition of defendants'
20 person(s) most knowledgeable was because these depositions "would not
21 be effectual until... Ms. Grande had been deposed[;]" however, the
22 evidence before the Court indicates otherwise. Plaintiff's counsel stipulated
23 prior to her deposition that Ms. Grande would not serve as a product
24 identification witness, demonstrating that Ms. Grande did not have any
25 product identification testimony. *Decl. Of Paul Lannus ("Lannus Decl.")*, ¶
26 20, Ex. F [Doc. No. 170-1] and *Barba Decl.*, ¶ 7. Mr. Brantley, the key
27 product identification witness, testified as to the identity of the defendants
28 and their products to which he worked around and with during his

1 deposition ten months prior, allowing Plaintiff ample time to propound any
2 necessary discovery on defendants. *Barba Decl.*, ¶ 5. Moreover, even if it
3 had been necessary to delay the taking of defendants' depositions until the
4 completion of Ms. Grande's deposition, Plaintiff's counsel still has not
5 demonstrated it acted with diligence in seeking this discovery. At a
6 minimum, counsel could have served notice of these depositions prior to
7 Ms. Grande's deposition with the depositions scheduled to occur
8 afterwards. Instead, Plaintiff's counsel waited until August 20, 2013, *eight*
9 *days after the completion of Ms. Grande's deposition* and ten days prior to
10 the deadline to complete fact discovery to serve notice of any defendant's
11 deposition.

12 Plaintiff's argument that Ms. Grande offered testimony as to potential
13 new witnesses and documents also does not demonstrate good cause for
14 Plaintiff to reopen discovery. Plaintiff does not identify who the new
15 potential witness(es) is/are or what the potential new document(s) is/are,
16 instead referring the Court to portions of the rough cut transcript of Ms.
17 Grande's deposition. [Doc. No. 162, p. 7.] Plaintiff also offers no
18 explanation as to why this information did not or could not come to light
19 earlier. According to Plaintiff's ex parte application, documents may exist
20 that contain the names of additional witnesses. *Id.* p. 6. Ms. Grande
21 testified, however, that the documents in question were stored in Mr.
22 Brantley's home. *Allison Decl.*, Ex. A, Rough Cut of Tr. of Dep. of Ms.
23 Grande, 44:21-45:5. In fact, she further testified that she believed some of
24 the "new" documents had already been provided to "Mark" – i.e., Marc
25 Willick the attorney with the Napoli Bern Ripka Shkolnik & Associates firm
26 that represented Plaintiff until December 28, 2012. *Id.*, 46: 8-20. If the
27 documents were in Mr. Brantley's possession, or possibly even in his
28 attorney's possession, this information should have been disclosed long

ago – if not in connection with Plaintiff’s Initial Disclosures, which were served on July 6, 2012, or Plaintiff’s ongoing duty to supplement the Initial Disclosures, then in response to written discovery requests by defendants or, most recently, in connection with the Request for Production of documents that accompanied the notice of Ms. Grande’s deposition. *Decl. of Stephen Farkas* (“*Farkas Decl.*”), Ex. A., Request No. 29 [Doc. No. 170.1]. Nonetheless, Defendants report these “new” documents still have not been produced, despite repeated requests by counsel. *Farkas Decl.* ¶¶ 6-7; *Lannus Decl.* ¶¶ 8, 11; Furthermore, the sole witness identified in the excerpts of Ms. Grande’s deposition to which Plaintiff refers the Court is Larry Durante, who is not a “new” witness as he was first identified by Mr. Brantley on October 24, 2012, during his deposition. *Lannus Decl.*, Ex. G, Tr. of Dep. of Gerald Brantley, Vol. 2, 116: 24-25.

B. Plaintiff Has Also Not Complied with Civ.L.R. 26.1 or the Undersigned’s Chambers Rules

Although the Court denies Plaintiff’s ex parte application due to counsel’s failure to demonstrate due diligence or good cause, the Court also notes that Plaintiff’s counsel completely failed to follow the letter and spirit of the Local Rules and this Court’s Chambers Rules in their meet and confer efforts, and instead chose to saddle this very busy Court with a problem entirely of their own making by means of an eleventh hour ex parte application. As indicated earlier, the relief sought by Plaintiff implicates Fed. R. Civ. P. 26 in that it seeks to amend the discovery plan determined by the parties and ratified by this Court. Civ. L.R. 26.1.a states “[t]he court will entertain no motion pursuant to Rules 26 through 37, Fed. R. Civ. P., unless counsel will have previously met and conferred concerning all disputed issues.” “If counsel have offices in different counties, they are to confer by telephone” prior to filing a discovery motion.

1 See also *Chambers Rules of the Hon. Jan. M. Adler*. In this case, Plaintiff's
2 counsel failed to satisfy this requirement.

3 The declaration submitted by Keenan W. Ng ("*Ng Decl.*") outlines
4 what Plaintiff describes as the efforts to meet and confer with the other
5 parties. Ng reports that on the morning of August 20, 2013, between 9 and
6 9:45 a.m., he placed separate calls to defense counsel to request they
7 each stipulate to the requested continuance and advise them an ex parte
8 application would be filed if an agreement could not be reached. *Ng Decl.*
9 ¶¶ 3-13. It appears he did not speak with counsel for Defendants
10 BorgWarner Morse Tec., Inc., Genuine Parts Company and National
11 Automotive Parts Association, IMO Industries, Inc., J. T. Thorpe and Son,
12 Inc., and Pep Boys Manny Moe and Jack of California prior to the filing of
13 the ex parte application; however, because some of the attorneys he spoke
14 with indicated they would oppose the request, Plaintiff proceeded with filing
15 the ex parte application anyway. Merely making a phone call to inform the
16 parties that Plaintiff would seek additional time to conduct discovery
17 through an ex parte application is inappropriate and does not satisfy the
18 meet and confer requirement of Civ. L.R. 26.1.a. or the undersigned's
19 Chambers Rules. Plaintiff's counsel should have instead, timely and with
20 reasonable notice, convened an "all party" conference during which
21 Plaintiff's proposal could have been fully and openly discussed by all
22 affected.

23 Furthermore, the undersigned's Chambers Rules require all disputes
24 regarding discovery be brought to the Court's attention through the filing of
25 a Joint Motion for Determination of Discovery Dispute, which is prepared
26 with the participation of all parties and only after meet and confer efforts do
27 not result in a consensus. Plaintiff's counsel instead elected to circumvent
28 that requirement by unilaterally filing the ex parte application.

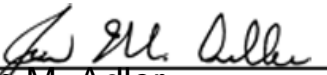
1 **III. Conclusion**

2 It was not Ms. Grande's unavailability for deposition until August 12,
 3 2013 that prevented Plaintiff from timely completing fact discovery. Rather,
 4 it was Plaintiff's counsel's lack of diligence in locating and producing
 5 relevant documents and information and waiting until the final days of fact
 6 discovery to notice the depositions of defendants' person(s) most
 7 knowledgeable. This is a situation in which Plaintiff's counsel sat on their
 8 hands, did little to litigate the case as the months passed by, served
 9 discovery only days before the discovery cut off, did nothing to resolve their
 10 disputes in a professional, competent manner, and then dumped
 11 everything in the Court's lap at the last minute. Plaintiff's ex parte
 12 application is, therefore, DENIED.

13 Defendant The Pep Boys Manny Moe & Jack of California requests
 14 the Court issue an evidence preclusion order pursuant to Rule 37(c)(1),
 15 prohibiting Ms. Grande from using at trial any of the documents mentioned
 16 in her deposition testimony that have not previously been produced. [Doc.
 17 No. 168, p. 4.] The Court declines to recommend an evidence preclusion
 18 order, but because these documents indeed should have been produced
 19 long ago (see Section II. A., pp. 5-6 above), orders Plaintiff to produce
 20 them to Defendants by **September 23, 2013** to the extent they have not
 21 already been produced.

22 **IT IS SO ORDERED.**

23 DATED: September 13, 2013

24 
 25 Jan M. Adler
 26 U.S. Magistrate Judge
 27
 28